90-1812

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ERNEST F. DARBOVEN,
Petitioner

versus

LOUIS NICKOLOPOULOS,
et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ernest F. Darboven,
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Freehold, New Jersey 07728
(908) 409-1309

QUESTIONS PRESENTED

1) Circuit Court failure to justify their decisions.

Four District Court Rulings that:

2) Falsely stated the primary basis for the civil rights complaint.

3) Negated (over-ruled) law enacted by the State Legislature.

4) Failed to recognize rights to due process granted via the enactment of State Law and Agency rules, policies or procedures.

5) Granted "absolute immunity" to those who did not perform an adjudicatory duty.

A question ripe for consideration:

6) Should Parole Hearings not satisfying the arguments for granting "quasi-judicial" immunity be protected by the umbrella of "absolute immunity."

PARTIES TO THE PROCEEDING

Petitioner and plaintiff pro se:

Ernest F. Darboven
710-3 Zlotkin Circle
Freehold, NJ 07728

State of New Jersey Parole Board
Defendant Respondents:

Louis Nickolopoulos, Chairman
Sally G. Carroll, Board Member
Luis H. Garcia, Board Member
Richard B Goldman, Board Member
Arthur C. Jones, Board Member
Peter W. Loos, Board Member
Loren W. Ranton, Board Member
Larry Gregorio, Counselor

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1. OFFICIAL & UNOFFICIAL REPORTS

a) JUDGEMENT ORDER OF THE DISTRICT COURT OF NEW JERSEY, 11/30/89. (Appendix pages A-02 thru A-17)

b) ORDER OF THE DISTRICT COURT OF NEW JERSEY, 10/15/90 (Appendix pages A-18 thru A-25)

c) JUDGEMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 3/12/91 (Appendix pages A-26 thru A-28)

d) SUR PETITION FOR REHEARING from UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 4/8/91 (Appendix pages A-29 & A-30)

2. JURISDICTION

This petition is submitted per RULES OF THE SUPREME COURT OF THE UNITED STATES; Rules 10 thru 14 and printed per Rule 33.

2.1 JUDGEMENT ORDER BY COURT OF APPEALS FOR THE THIRD CIRCUIT, No. 90-5954.
Attest date: March 12, 1991
(Appendix page A-26)

2.2 SUR PETITION FOR REHEARING, No. 90-5954.
Stamp date: April 8, 1991
(Appendix page A-29)

3. STATUTE and ADMINISTRATIVE CODE

3.1 NEW JERSEY STATUTE 30:4-123.58, derived from Assembly Bill 3093, subsection 14.a.1 thru 8. The law:

> Any denial of parole by a board panel shall in accordance with criteria established by the board, be appealable to the full board by the inmate or one acting on the inmate's behalf. If appealed, the full board shall decide the appeal except that any board member who participated in the decision from which the appeal is taken may not participate in the (resolution) disposition of that appeal. The board shall serve notice on all parties setting forth the decision, the particular reasons therefor, and the facts relied upon.

3.2 PAROLE BOARD ADMINISTRATIVE CODE

N.J.A.C. 10A:71-4.3 Appellate procedure

> (a) All appeals submitted pursuant to N.J.A.C 10A:71-4.1 and 4.2 shall be filed in writing and shall contain the reasons for the appeal and the criteria under which the appeal is submitted.

(b) Appeals filed by inmates shall be considered by the Board panel, Board or Chairperson, as appropriate, within 45 days of the date the appeal was received.

(c) The Chairperson or Board panel member shall notify the inmate in writing of the decision within 14 days of such decision.

(d) The Board panel, Board or Chairperson, as appropriate, may affirm, modify or reverse the opinion being appealed, or may remand the case to the Board's staff, hearing officer, Board member or Board panel for further consideration.

4. STATEMENT OF THE CASE

The primary issue in petitioner's original civil rights complaint is the fact repeated requests to the full board for the full board decision defined in statute 30:4-123.58 were ignored. Because of their relevance, three points of interest will be extracted from it.

> 1) An appeal to the full board shall be decided by the full board.
>
> 2) Any board member who participated in the decision from which the appeal is taken may not participate in the resolution of the appeal.
>
> 3) The board shall serve notice on all parties setting forth the decision, the particular reasons therefor, and the facts relied upon.

4.1 QUESTION 1 As noted in point 3), an appeals panel should set forth the decision, the particular reasons therefor, and the facts relied upon. These elements are essential when the facts are in question, the decision being appealed is internally inconsistent, the

decision being appealed incorrectly states the basis for the complaint, and the decision being appealed incorrectly quotes Law. In summary, the Circuit's failure to document any reasons for its decisions or the facts relied upon should not be permitted.

4.2 QUESTION 2 A quotation from page 5 (Appendix A-11) of the District JUDGEMENT ORDER dated 11/30/89 follows:

> Plaintiff relies on the "Inmate Handbook" issued to him by the parole board as authority for the proposition that he had an absolute right to a full panel review denied him by defendants ....

This statement by the District Court is untrue and avoids addressing the primary issue in the case at bar, petitioner's repeated assertions that law enacted by the New Jersey State Legislature gave him the absolute right to a full board review and decision. Petitioner BRIEFS to the

District Court have referenced the law, referenced the Assembly Bill from which it was derived and quoted the law verbatim but, to date, the District and Circuit have failed to acknowledge its existence and the real basis for the original civil rights complaint. Therefore, it is not known whether the Circuit considered the primary issue to be based on an "Inmate Handbook" authored by person(s) unknown or law enacted by the New Jersey State Legislature. It is a question that must be answered because it is the primary basis for the original civil rights complaint.

4.3 QUESTION 3 A quotation from page 5 (Appendix A-10,11) of the District JUDGEMENT ORDER dated 11/30/89 follows:

> In the complaint, plaintiff alleges that defendant Louis Nickolopoulos, improperly denied his appeals of the parole panel's determination. Plaintiff relies on the "Inmate

> Handbook" issued to him by the parole board as authority for the proposition that he had an absolute right to full panel review denied him by defendants, Richard B. Goldman, Arthur W.Jones, Peter W. Loos and Loren W. Ranton's refusal to respond to his letters and that Nickolopulos's independent review and decision of plaintiff's parole appeal contravened New Jersey State law. An examination of New Jersey law, however, demonstrates that "the Board panel, Board or Chairperson" has the authority to review a parole determination and render a decision. N.J. Admin. Code sec. 10A:71-4.3 (emphasis added).

Because of its tremendous significance, a part of the quote will be repeated:

> An examination of New Jersey law, however, demonstrates that "the Board panel, Board or Chairperson" has the authority to review a parole determination and render a decision. N.J. Admin. Code sec. 10A:71-4.3 (emphasis added).

However, an examination of New Jersey Law proves that the Board panel, Board or Chairperson does not have the authority to review and decide an appeal to the full board. Furthermore, the previous quote does not literally state that it

does. As petitioner proved in his PETITION FOR REHEARING dated MARCH 1991, the District Court made a grievous error and incorrectly read N.J.A.C. 10A:71-4.3. The PETITION FOR REHEARING proved the Administrative Code was taken out of context. Allowing Circuit affirmation that "the Board panel, Board or Chairperson" has the authority to review a parole determination and render a decision on an appeal to the full board can not be tolerated because it over rides law enacted by the New Jersey State Legislature and thereby violates well established principles of "comity." The proposition that Jersey Parole Board Administrative Code can over ride an act of the State Legislature can not be valid and a correct reading of the code reveals it does not do so. As established in the PETITION FOR REHEARING, a complete

reading of the Administrative Code reveals paragraph 10A:71-4.3 is a generic paragraph that only addresses the topic of "procedures" and not who can perform them. It covers the procedures to be used for appeals to different parties, hence the critical phrase "as appropriate" that was omitted from the District Court quote. The violation of "comity" principles is evident upon a review of paragraph 3.

4.4 QUESTION 4 Petitioner's MOTIONS to the District Court stressed that his claims of "due process" denials were based solely upon rights to "due process" granted via the enactment of State Law and the creation of Parole Board Rules, Policies and Procedures. Nevertheless, the District implied that petitioner had received all the processes he was due because those explicitly mandated by the

U.S. Supreme Court had been satisfied. This specious District argument begins on page 3 (Appendix A-22) of its ORDER dated 10/15/90. Petitioner's APPEAL to the Circuit noted that the District decisions identified a minimal set of "due processes" but the enactment of New Jersey State Law and the generation of Parole Board Rules, Policies and Procedures added considerably to that minimal set. The most outstanding example being the previously presented Statute granting the right to a full board review and decision, Statute 30:4-123.58. Petitioner's APPEAL BRIEF dated DECEMBER 1990. cited the following precedents: In Rheuark v. Shaw, 628 F.2d 297 (Fifth Circuit, 1980) at page 298 it was ruled:

> Constitution does not require the states to afford a right to appellate review of a criminal conviction, but when a state provides a right to appeal, it must

meet the requirements of due process and equal protection.

In Soto v. Cady, 566 F.Supp. 773 (1983)

at page 774 it was ruled:

> State can create liberty interest under Fourteenth Amendment by statute, by rule, or by regulation; if state places limitation on official discretion it in all likelihood has created liberty interest.

Petitioner's PETITION FOR REHEARING dated

MARCH 1991 noted the following on page 7:

> The Court of Appeals JUDGEMENT ORDER dated MARCH 12, 1991 affirmed a decision by the District Court of New Jersey that failed to maintain uniformity with a previous decision within the District, Ingenito v. Dept. of Corrections, State of N.J., 568 F.Supp 946 (1983). The referenced precedent and similar decisions in virtually every court have established federally protected rights to "due process" may be granted via the enactment of State Laws or the creation of agency Rules, Policies or Procedures.

By virtue of its blanket dismissal of

petitioner's several claims of federally

protected granted rights to "due process"

created by enactment of State Law and the creation of Parole Board Rules, Policies or Procedures; the Circuit has affirmed a District Court Ruling that is in conflict with Circuit Court decisions and those of the Court granting Summary Judgement.

4.5 QUESTION 5 Petitioner's APPEAL BRIEF dated DECEMBER 1990 documented that his appeal of parole denial to the full board was denied without any notice that it had not been reviewed and decided by the full board. In a revelation that should shock one's conscience, petitioner subsequently learned that inmates were led to believe that their appeals were being decided by the full board when, in fact, they were not. Inmates never realized appeals to the full board were being rejected by the Chairman without being reviewed by the full board because Parole Board letters in response to full

board appeals did not indicate who conducted the review and made the decision. Inmates assumed appeals to the full board were being reviewed and decided by the full board because State Law and "Inmate Handbooks" document that appeals to the full board shall be decided by the full board. The rejection process described is a phantom process that, until discovered by petitioner, inmates never realized was taking place.

In the "FACTS AND PROCEDURAL HISTORY" section of its ORDER dated 10/15/90, the District Court stated the following on page 1 (Appendix A-19):

> On November 30, 1989 this court dismissed plaintiff's claims against defendants Nickolopoulos, Goldman, Jones, Loos, and Ranton. The court determined that the defendants were acting in their adjudicatory capacity and therefore absolutely immune from liability.

The Circuit's JUDGEMENT ORDER dated March 12, 1991 failed to maintain uniformity with the decision it rendered in Thompson v. Burke, 556 F.2d 231 (3rd Cir. 1977). The following was ruled at page 237 of Thompson v. Burke:

> The work of a Pennsylvania State Parole Board member certainly includes facets of quasi-judicial duties affecting the length of sentences, nevertheless they are not judicial officers. They are in reality executive officers carrying out the policy of the State in respect to probation and parole.

The Circuit then proceeded to assert that Parole Board Members are only entitled to quasi-judicial immunity when engaged in adjudicatory duties.

As was documented in the PETITION FOR REHEARING dated MARCH 1991, per Coles v. Levine, 561 F.Supp 146 (1983), in turn derived from Butz v. Economou, 98 S.Ct. 2894 (1978), the phantom rejection of appeals to the full board in a process

inmates do not even know takes place, most assuredly can not be considered an adjudicatory duty. An even more profound judicial error was the assertion that refusing to perform a judicial function mandated by State Law constitutes an adjudicatory duty. By allowing District ORDERS to stand, the Circuit has introduced inconsistency within the Circuit.

4.6 QUESTION 6 Petitioner's APPEAL BRIEF dated DECEMBER 1990 invited commentary on an issue that begs to be addressed by the U.S. Supreme Court, the question of immunity for Parole Board Members when they are rendering parole decisions. Guidance is frequently sought from Supreme Court rulings but is never found. In the State of New Jersey, prisoners are frequently imprisoned for years contrary to law and, to date, they

have not found a way to prevent the practice or be compensated for their losses. Parole hearings are held in secret and may not comply with law but there is no way to prove it. Inmates do not have the option of being released on bail pending a resolution of their appeals. Inmates do not have a right to a public defender. Retaining a private attorney in an attempt to gain relief via the Courts costs up to $45,000.00, few can afford it. Most recognize that they are totally defenseless against wrongful imprisonment and so they simply do the time and develop contempt for society in the process. The New Jersey Parole Board has learned that it is above the law. As was documented in petitioner's APPEAL BRIEF dated DECEMBER 1990, the arguments presented by previous U.S. Supreme Courts for granting quasi-judicial immunity to

other bodies do not apply to the New Jersey Parole Board.

5. JURISDICTION: COURT OF FIRST INSTANCE

The original civil action was authorized by 42 U. S. C. section 1983 to redress the deprivation, under color of State Law, of rights secured by the Constitution of the United States. The court has jurisdiction under 28 U. S. C. section 1343.

6. ARGUMENTS IN SUPPORT OF CERTIORARI

6.1 As may be determined from the following, Circuit failure to document the reasons for their decisions and the facts relied upon should not be permitted to go uncorrected.

6.2 The primary issue in the case at bar is law enacted by the Jersey Legislature that grants an inmate the right to appeal parole denial to the full board. The law goes on to state: If appealed, the full board shall decide the appeal. The law is quoted in paragraph 3.1. and the original civil rights complaint was based upon it. BRIEFS to the District and the Circuit referenced the law, the Assembly Bill from which it was derived, and quoted the law verbatim. Nevertheless, the District and Circuit have refused to correct the District Court ruling that petitioner based his

claim for a right to a full board decision on his "Inmate Handbook." Circuit failure to settle a question of fact that is the primary issue in the case at bar has so far departed from the accepted and usual course of judicial proceedings that it calls for an exercise of the Supreme Court's power of supervision, per Rule 10.1(a).

6.3 The District Court then proceeded to over rule the New Jersey State Legislature's enactment of law per Statute 30:4-123.58 by making an erroneous claim regarding Parole Board Administrative Code, the claim that the Board panel, Board, or chairperson has the right to decide an appeal to the full board. Reviewing the Statute and Administrative Code (paragraphs 3.1 and 3.2) proves petitioner's claim beyond doubt. Furthermore, a State Agency's

Administrative Code can not over rule law enacted by the State's Legislature. This District Court error must not be permitted to go uncorrected because of the precedent it will set in the District of New Jersey. The District and opposing counsel must not be encouraged to perpetuate violations of State Law and rights to "due process." The Supreme Court has already decided the question of "comity" such that a Federal District Court can not re-write State Law. It is a well established principle and the meaning of Rule 10.1(c) is satisfied.

6.4 By virtue of ignoring repeated petitioner arguments that the enactment of State Law and the creation of Parole Board rules, policies and procedures granted him federally protected rights to due process, the District and Circuit Courts have introduced an inconsistency

with virtually all Federal Courts, including their own. This inconsistency with a Federal Court of Appeals per Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980) demonstrates that Supreme Court reversal would be warranted per Rule 10.1(a)

6.5 By virtue of granting "absolute immunity" to the defendants who refused to perform an adjudicatory duty mandated by an act of the New Jersey State Legislature, an inconsistency was introduced within the Court of Appeals for the Third Circuit. A similar inconsistency was introduced by granting "absolute immunity" to the Board Chairman for personally rejecting appeals to the full board in a process that inmates do not know takes place and for which there is an absence of authority or published guidelines. The inconsistencies are based

upon previous Circuit rulings in Thompson v. Burke, 556 F.2d. The conflict warrants review per Rule 10.1(a). In addition, petitioner submits that the District Court should not be permitted to set the precedent of allowing a defense counsel to successfully argue that the decision to ignore a process mandated by law can be called adjudicatory in nature and therefor protected under the umbrella of quasi-judicial immunity. Federal protection of rights to "due process" would be emasculated if this defense contention is allowed to stand. This is not a question that has been, but should be settled by the Supreme Court, per Rule 10.1(c).

6.6 The trend in the Circuits has been to grant "absolute immunity" to Parole Board Members for their decision making during parole hearings. The question that

is ripe for Supreme Court consideration is whether or not some meaningful requirements must be met in order to be entitled to "absolute immunity." As was documented in petitioner's APPEAL BRIEF dated DECEMBER 1990, New Jersey inmates are totally defenseless against year(s) of wrongful imprisonment. The Supreme Court should consider requiring that State Court remedies/bail be available to all within a prescribed time frame. Without some form of relief, Jersey inmates will remain defenseless against years of wrongful imprisonment. It should not be left up to the individual States to decide how many years of imprisonment contrary to law are acceptable.

6.7 IN CONCLUSION There are two different versions of the basis for the case at bar. As is thoroughly documented, petitioner's civil rights complaint is

primarily based upon the fact repeated requests for a full board review and decision regarding parole denial were refused. It has also been thoroughly documented that law enacted by the State Legislature mandates that such an appeal shall be decided by the full board.

A review of District Court ORDERS will reveal that its rulings were based upon two serious errors that, for practical purposes, completely changed the substance of the case at bar. First, the District refused to acknowledge existence of the statute that granted the right to a full board review and decision and the fact petitioner's claim was based upon it. Instead, the District Court incorrectly asserted that petitioner's claim for the right to a full panel review and decision was based upon his "Inmate Handbook." Second, the District

Court falsely asserted that Parole Board Administrative Code gave the Board panel, Board or Chairperson the right to decide an appeal to the full board. This argument is clearly in error and only attains a degree of believability by taking the liberties of incorrectly quoting Administrative Code and ignoring the existence of law enacted by the State Legislature, 30:4-123.58.

The Circuit appeals process becomes meaningless if it does not determine and document which of two conflicting arguments concerning the primary basis for a complaint is the correct one. The question of whether or not a District Court can dismiss a civil rights complaint based upon a false statement of the complaint's primary issue and then have the error go uncorrected by the Circuit and U.S. Supreme Courts is a

question that, because of its importance, must be answered or the right to appeal becomes meaningless.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ERNEST F. DARBOVEN,
Plaintiff,

v.

LOUIS NICKOLOPOULOS,
et al.,
Defendants.

Hon. Joseph H. Rodriguez
Civil Action No. 88-1693

JUDGEMENT ORDER

This matter comes before the court on defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief may be granted and Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction. For the reasons stated herein, defendant's motion to dismiss is granted in part and denied in part.

Plaintiff, a former inmate at Leesburg State Prison, brings this action pursuant to 42 U.S.C. sec. 1983 (West

1981), claiming that defendants used unlawful procedures in connection with his Parole Board hearing. Plaintiff asserts that defendants: (1) denied parole without proving, by a preponderance of evidence, that there was a substantial likelihood plaintiff would commit a crime if released, pursuant to N.J. Stat. Ann. sec. 30:4-123.51 (West Supp. 1989); (2) failed to follow documented procedures which resulted in the denial of parole; and (3) denied plaintiff a full panel review and a full panel decision regarding his appeal. In addition, plaintiff contends that the Parole Board chairman failed to provide proper leadership and remedy plaintiff's alleged denial of his due process rights. The relief requested by plaintiff includes declaratory judgement as well as compensatory and punitive damages.

Defendants contend that plaintiff's complaint should be dismissed pursuant to Fed. R. Civ P. 12(b)(1) and 12(b)(6) because the Parole Board members are entitled to absolute or good faith qualified immunity from a suit for damages under 42 U.S.C. sec. 1983 since they were functioning in an adjudicatory capacity. In the alternative, defendants assert that plaintiff Darboven's subsequent release on parole renders the portion of the complaint alleging procedural irregularities by defendants moot and, therefore subject to dismissal.

I. Section 1983

In Kentucky v. Graham, 473 U.S 159 (1985), the Supreme Court held that a suit against an individual in his or her official capacity seeking monetary relief that is payable from the state treasury is actually an action against the state.

Id. at 165-66; see Brandon v. Holt, 469 U.S. 464, 471 (1985). Hence, a suit against the instant defendants in their official capacities seeking monetary damages would in fact be an action against the State of New Jersey.

In Will v. Mich Dept. of State Police, 109 S.Ct. 2304 (1989) the Supreme Court addressed the issue of whether the state could be considered a "person" within the meaning of section 1983. After examining the doctrinal developments since Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) (holding that municipality was person under sec. 1983, overruling Monroe v. Pape, 365 U.S. 167 (1961) and the legislative history of section 1983, the Court concluded that a state was not a "person" under the statute. The majority placed one caveat upon this general rule.

Borrowing from the doctrine of sovereign immunity under the eleventh amendment, the Court noted that an individual sued in his official capacity would be a person under the statute if plaintiff sought prospective injunctive relief only. Id. at 2311 n.10. Plaintiff, however, seeks only declaratory judgment and compensatory and punitive damages.

II. Absolute Immunity

The applicable standard of review for a Rule 12(b)(6) motion requesting dismissal based on absolute immunity is "whether taking the allegations of the complaint as true, ... and viewing them liberally giving plaintiffs the benefit of all inferences which fairly may be drawn therefrom, ... ' it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief.'" Wilson v.

Rackmill, 878 F.2d 772, 775 (3d Cir 1989)(quoting Wisniewski v. Johns Manville Co., 759 F.2d 271 (3d Cir. 1985)).

Under Harper v. Jeffries, 808 F.2d 281 (3d Cir. 1986), parole officers are entitled to absolute immunity when they are engaged in adjudicatory duties. Wilson, 878 F.2d at 775. On the other hand, parole officers in their administrative or executive capacity are entitled only to a qualified, good faith immunity. Id. (citing Harper, 808 F.2d at 284). This court must examine plaintiff's complaint to determine whether he alleged that the eight defendants performed adjudicatory duties, entitling them to absolute immunity, or executive and administrative duties, entitling them to good faith immunity. Wilson, 878 F.2d at 775-76. For defendants to succeed on a

Rule 12(b)(6) motion based on absolute immunity, "the allegations of [plaintiff's] complaint must indicate the existence of absolute immunity as an affirmative defense; the defense must clearly appear on the face of the complaint." Id. at 776.

In the complaint, plaintiff alleged that defendants, Sally G. Carroll and Louis H. Garcia, served as hearing examiners performing adjudicatory duties. Plaintiff, however, also claims that Garcia authored an "Initial Interview Form" which was allegedly part of the deprivation of plaintiff's constitutional rights. See Plaintiff's Complaint sec. 4. PP 6, 31. Plaintiff, in his opposition to this motion, concedes that Carroll and Garcia's conduct during the parole hearing is protected by absolute immunity, but goes on to argue that they

"knowingly usurped the authority of the Superior Court of New Jersey by denying parole for punitive reasons" and that their conduct, therefore, falls within the exception to absolute immunity carved out by the Supreme Court in Stump v. Sparkman, 435 U.S. 349 (1978).

The Stump Court affirmed the well-settled principle that "[a] judge will not be deprived of immunity because the action he [or she] took was in error, was done maliciously, or was in excess of his [or her] authority; rather he [or she] will be subject to liability only when he [or she] has acted in the 'clear absence of all jurisdiction'" Id. at 356-57 (citing Bradley v. Fisher, 13 Wall. 335, 351 (1872)). The distinction between lack of jurisdiction and excess of jurisdiction is not easily discernible. Taking plaintiff's allegations as true

regarding the punitive nature of defendant's actions, Carroll and Garcia can only be said to have acted in excess of their jurisdiction, rather than "in clear absence of all jurisdiction." As members of the Parole Board assigned to conduct plaintiff's parole hearing, Carroll and Garcia had jurisdiction to make the parole eligibility determination. Because plaintiff alleges only adjudicatory conduct on the part of Carroll, this court will dismiss the claims against her. On the other hand, because the complaint contains allegations that Garcia performed non-adjudicatory as well as adjudicatory duties, this court will not dismiss the complaint with respect to him in his individual capacity.

In the complaint, plaintiff alleges that defendant Louis Nickolopoulos

improperly denied his appeals of the parole panel's determination. Plaintiff relies on the "Inmate Handbook" issued to him by the parole board as authority for the proposition that he had an absolute right to full panel review denied him by defendants, Richard B. Goldman, Arthur L. Jones, Peter W. Loos and Loren W. Ranton's refusal to respond to his letters and that Nickolopoulos's independent review and decision of plaintiff's parole appeal contravened New Jersey State Law. An examination of New Jersey law, however, demonstrates that "the Board panel, Board or Chairperson" has the authority to review a parole determination and render a decision. N.J. Admin. Code sec. 10A:71-4.3 (emphasis added). New Jersey law provides alternative methods of appellate review of a parole panel's decision, but does

not create the right to a full panel review. Additionally, defendant cannot be held liable for the conduct of other parole officials under section 1983 based on the doctrine of respondeat superior. Detore v. Local #245 of New Jersey City Employees Union, 615 F.2d 980, 983 (3d Cir. 1980). Consequently, this court will dismiss the complaint with respect to defendants Nickolopoulos, Goldman, Jones, Loos, and Ranton.

III. Qualified Immunity

Regarding defendant's assertion that the portion of the complaint suing defendants, Garcia and Gregorio, in their individual capacity be dismissed, defendants' brief misconstrues the law. In Harlow v. Fitzgerald, 457 U.S. 800, 819 (1981), the Court states that an official pleading an immunity defense should ordinarily fail because a

"reasonably competent official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." Id. So too, in Anderson v. Creighton, 483 U.S. 635, 641 (1986) the Supreme Court held that the principles of qualified immunity require that the defendant be permitted to argue that he is entitled to such immunity. Id. Thus, it is the defendant's burden to prove that his or her actions were objectively, legally reasonable. Id. This standard was applied by the Third Circuit Court in Thompson v. Burke, 556 F.2d 231, 239 (3d Cir. 1977). The Thompson court held that "in sec. 1983 actions the burden is on the defendant official

claiming the official immunity to come forward and convince the trier of fact by a preponderance of the evidence that, under the standards of Wood v. Strickland, official immunity should attach." Id. In the instant case, there are insufficient factual allegations set forth in the supporting brief to objectively support a claim of qualified immunity under Harlow and Anderson.

As for the defendant's assertion of a good faith defense, the court in Safeguard Mutual Insurance Co. v. Miller, 472 F.2d 732 (3d Cir. 1973) held that "since good faith is a matter of defense, the determination of that issue as to each defendant also must await proceedings beyond a Rule 12(b)(6) motion." Id. at 734. See also Lasher v. Shafer, 460 F.2d 343 (3d Cir. 1972).

Finally, defendants raise the issue of mootness, stating that plaintiff Darboven's action has been rendered moot as a result of plaintiff's subsequent release.

A case is moot "when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969), cited in County of Los Angeles v. Davis, 440 U.S. 625, 631 (1978).

The voluntary cessation of official activity may, of course, moot a case. New Jersey Turnpike Authority v. Jersey Central Power and Light, 772 F.2d 25, 31 (3d Cir. 1985). However, the defendants bear a "heavy burden" to establish mootness in such a case. Iron Arrow Honor Society v. Heckler, 464 L.Ed.2d 58 (1983). Two conditions must be met by

defendants in order for cessation of a challenged policy to moot a case. First, there must be no reasonable likelihood that the alleged wrong will recur. Iron Arrow, 464 at 72. Second, the party seeking relief must have been rendered whole. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979).

Although there is no reasonable likelihood that plaintiff will suffer the same alleged constitutional violation again, it is evident that his subsequent release from prison does not make him whole since it does eradicate the civil rights violations the plaintiff allegedly suffered. Additionally, if a jury determines that plaintiff's constitutional rights were violated he may be entitled to damages. Thus, while the first prong of the mootness test may be satisfied, the second has not.

For the reasons set forth above, and for good cause shown;

IT IS on this 30th day of November, 1989 ORDERED that defendant's, Louis H. Garcia and Larry Gregorio's motion for dismissal of claims against them in their individual capacity is hereby DENIED;

IT IS FURTHER ORDERED that defendants Garcia and Gregorio's motion to dismiss the complaint against them in their official capacity is hereby GRANTED;

IT IS FURTHER ORDERED that defendants, Louis Nickolopoulos, Sally G. Carroll, Richard B. Goldman, Arthur L. Jones, Peter W. Loos and Loren W. Ranton's motion to dismiss the complaint against them in both their individual and official capacities is hereby GRANTED.

JOSEPH H. RODRIGUEZ
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ERNEST F. DARBOVEN,
Plaintiff,

v.

LOUIS NICKOLOPOULOS,
et al.,
Defendants.

Hon. Joseph H. Rodriguez
Civil Action No. 88-1693

ORDER

FACTS AND PROCEDURAL HISTORY

This matter comes before the court on defendants', Luis Garcia and Larry Gregorio, motion for summary judgement pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. For the reasons set forth below defendant's motion is granted.

On April 15, 1988 plaintiff, Ernest F. Darboven, a former prisoner at Leesburg State Prison, filed a sec. 1983 claim alleging that his due process

rights were violated when he was denied parole on July 31, 1987. Plaintiff named as defendants Louis Nickolopoulos, Sally Carroll, Richard Goldman, Arthur Jones, Peter Loos, Loren Ranton, Luis Garcia, and Larry Gregorio. On November 30, 1989 this court dismissed plaintiff's claims against defendants Nickolopoulos, Goldman, Jones, Loos and Ranton. The court determined that the defendants were acting in their adjudicatory capacity and therefore absolutely immune from liability. The court also dismissed plaintiff's claims against defendants Garcia and Gregorio for actions taken in their official capacity but not for actions taken in their individual capacity. It was determined that defendants Garcia and Gregorio were only entitled to qualified immunity for those actions taken in their administrative

capacity. Plaintiff's claims against Garcia and Gregorio for actions taken while acting in their administrative capacities are the subject of this motion.

Plaintiff's allegations against defendants, Garcia and Gregorio, are as follows. Luis Garcia was an associate member of the New Jersey State Parole Board. On October 6, 1984 Garcia filled out the plaintiff's Initial Interview Form. The form recommended plaintiff enter an alcohol counseling program. Plaintiff never saw the form nor was he ever made aware of its contents. Garcia also never recommended counseling to plaintiff. Larry Gregorio was a parole counselor at Riverfront State Prison. Gregorio never mentioned the Interview Form to plaintiff. Gregorio never told plaintiff that if he entered an alcohol

counseling program it would increase his chances for parole. Plaintiff alleges that the defendant's failure to disclose the information violated his due process rights. Defendant's moved for summary judgement pursuant to Rule 56(b) contending that they are entitled to qualified immunity.

DISCUSSION

The party asserting the defense of qualified immunity has the burden of establishing that immunity attaches. Anderson v. Creighton, 483 U.S. 635, 641 (1986); see also Thompson v. Burke, 556 F.2d 231, 239 (3d Cir. 1977). In Harlow v. Fitzgerald, 457 U.S. 800, 818 (1981) the Supreme Court set forth when qualified immunity attaches.

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages isofar as their conduct does not violate clearly

> established statutory or constitutional rights of which a reasonable person would have known.

Thus, the first issue that must be addressed is whether the plaintiff has a clearly established constitutional right.

Plaintiff claims that his due process rights were violated when he was denied parole. And that defendants' conduct was responsible for his denial of parole. "[T]he presence of a parole system by itself does not give rise to a constitutionally protected liberty interest in parole releases." Board of Pardons v. Allen, 482 U.S. 373, 369 (1986). Therefore, there is no constitutional right to parole. Greenholtz v. Nebraska Penal Inmates, 422 U.S. 1, 7 (1979). However, if a state statute creates an expectation that parole will be granted if certain standards are met then there is a liberty

interest that is protected by the Due Process clause. Id. at 12. The New Jersey Supreme Court has held that New Jersey's Parole Act "creates 'a significant expectancy of parole [eligibility] to entitle [prisoners] to some measure of constitutional protection with respect to parole [eligibility] decisions.'" New Jersey Parole Bd. v. Byrne, 93 N.J. 192, 203 (1983) (quoting Vitek v. Jones, 445 U.S. 480, 489 (1980)).

Once it has been determined that there is a protected liberty interest with respect to parole eligibility the next question is what process is due. In Greenholtz the Court determined that the process due in the context of an initial parole decision is an opportunity to be heard and if parole is denied a statement of the reasons why the inmate fell short of qualifying for parole. Greenholtz, 442

U.S. at 16. Put more simply, the inmate is entitled to notice, an opportunity to be heard and a statement of reasons.

Plaintiff alleges his due process rights were violated by the defendants because they failed to provide him with certain information that would have helped him obtain parole. But in the context of initial parole decision all the process that is due is notice, an opportunity to be heard, and a statement of the reasons why parole was denied. The process that is due in the context of initial parole decisions is a limited one and the plaintiff has received all he is due. In Greenholtz the Court stated that it finds "nothing in the due process concepts as they have thus far evolved that requires ... [a] Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on

which it rests the discretionary determination that an inmate is not ready for conditional release." Id. at 15. Thus, defendants have not violated clearly established constitutional due process rights by withholding information regarding parole eligibility from the plaintiff. Accordingly, as a matter of law defendants are entitled to summary judgement.

IT IS, THEREFORE, on this 15th day of October, 1990 ORDERED that defendants' motion for summary judgement is GRANTED.

JOSEPH H. RODRIGUEZ
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5954

ERNEST F. DARBOVEN

Appellant

v.

LOUIS NICKOLOPOULOS,
as an individual and in his official capacity as Chairman of the State Parole Board;
SALLY G. CARROLL,
as an individual and in her official capacity as an Associate Member of the State Parole Board;
LUIS H. GARCIA,
as an individual and in his official capacity as an Associate Member of the State Parole Board;
RICHARD B. GOLDMAN,
as an individual and in his official capacity as an Associate Member of the State Parole Board;
ARTHUR C. JONES,
as an individual and in his official capacity as an Associate Member of the State Parole Board;
PETER W. LOOS,
as an individual and in his official capacity as an Associate Member of the State Parole Board;

LOREN W. RANTON,
as an individual and in his official capacity as an Associate Member of the State Parole Board;
LARRY GREGORIO,
as an individual and in his official capacity as an employee of the State Parole Board

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Appeal from the United States District Court for the District of New Jersey
(D.C. Civ. No. 88-01693)
District Judge:
Honorable Joseph H. Rodriguez

Submitted
February 25, 1991
Before: SLOVITER, Chief Judge, and MANSMANN and SCIRICA, Circuit Judges.

JUDGEMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

Carol Los Mansmann

Circuit Judge

Attest: Mar 12 1991

Sally Mrvos, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5954

ERNEST F. DARBOVEN

Appellant

vs.

LOUIS NICKOLOPOULOS, etc., et al.

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD AND ALITO, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Carol Los Mansmann

Circuit Judge

APR 8 1991